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24 and the Proposed Classes*

25 **UNITED STATES DISTRICT COURT FOR THE**

26 **NORTHERN DISTRICT OF CALIFORNIA**

27 Alicia Hernandez et al., individually and on  
28 behalf of all others similarly situated,

29 Plaintiffs,

30 v.

31 Wells Fargo & Company and Wells Fargo  
32 Bank, N.A.,

33 Defendant.

34 Case No. 3:18-cv-07354-WHA

35 **PLAINTIFFS' REPLY BRIEF IN  
36 SUPPORT OF MOTION FOR LEAVE  
37 TO FILE THIRD AMENDED  
38 COMPLAINT**

39 Date: January 15, 2020

40 Time: 10 a.m.

41 Dept: Courtroom 12

42 Judge: Hon. William H. Alsup

1     **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2         Defendant Wells Fargo has filed an overheated response to a routine motion to amend a  
 3 complaint that merely proposes to name one additional plaintiff, Sandra Campos, as a California class  
 4 representative. This minor addition was occasioned by the Court's recent instruction that Plaintiffs  
 5 should seek to certify a California-only class while the Court holds in abeyance consideration of  
 6 proposed nationwide and other state classes. Because the request to amend was sought promptly, and  
 7 because there is no countervailing reason (prejudice, bad faith, or futility) to deny this limited  
 8 amendment, Plaintiffs' motion should be granted.

9         Wells Fargo disagrees, claiming that Plaintiffs should have anticipated recent events well before  
 10 now. But clairvoyance is not what the law demands of a party seeking to amend a complaint after the  
 11 deadline set by a Rule 16 schedule. The law merely demands good cause. And good cause exists when  
 12 a party acts diligently—with diligence being measured from the time the moving party receives facts  
 13 that indicate an amendment is warranted.

14         The record here demonstrates diligence. The putative class representatives in earlier pleadings  
 15 were from different states and had either Fannie/Freddie or FHA contracts. To obtain nationwide relief,  
 16 it was unnecessary to propose representatives from each state with both Fannie/Freddie and FHA  
 17 contracts. But now that this Court has expressed its preference for limited consideration of class  
 18 certification for California, Plaintiffs have sought to add a Californian with an FHA contract so that the  
 19 propriety of class certification can be addressed cleanly and without an unnecessary dispute over  
 20 whether existing named Plaintiffs from California who have Fannie/Freddie contracts can stand in the  
 21 shoes of Californians with FHA contracts. Plaintiffs made their request soon after this Court expressed  
 22 its preference on how to manage this case, and thus Wells Fargo's argument about delay falls flat.

23         Wells Fargo's arguments about prejudice also fail. The amendment would introduce no new  
 24 claims; it has no impact on the Court's rulings on the pleadings; and there has been more than sufficient  
 25 time for Wells Fargo, a sophisticated and frequent litigant, to take discovery of one more putative class  
 26 representative. To that end, Wells Fargo has already deposed Campos (and her husband) and Plaintiffs  
 27 have produced her relevant documents. Wells Fargo's claim of prejudice not only overstates the impact

1 that this limited additional discovery has had on it, but this contention also ignores that at the same  
 2 hearing during which the Court confirmed that Plaintiffs should prioritize a California class, the Court  
 3 instructed Wells Fargo to depose *all* putative class members. As such, this discovery was inevitable.

4       Lastly, Wells Fargo accuses Plaintiffs of acting in bad faith by waiting too long to amend – but  
 5 it is irresponsible of Wells Fargo to insinuate bad faith without any credible basis for doing so –  
 6 especially given the vanilla nature of this amendment.

7 **II. ARGUMENT**

8       **A. Plaintiffs Have Demonstrated “Good Cause” Under Rule 16**

9       Rule 16(b) provides that a scheduling order shall be modified “only for good cause.” Fed. R.  
 10 Civ. P. 16(b)(4). “Rule 16(b)’s ‘good cause’ standard primarily considers the diligence of the party  
   seeking the amendment.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).  
 12 Diligence is measured in view of the timing and circumstances occasioning the need to amend the  
 13 pleadings. *See Bradley v. T-Mobile US, Inc.*, No. 17-CV-07232-BLF, 2019 WL 2358972, at \*2 (N.D.  
 14 Cal. June 4, 2019); *LaPointe v. County of Los Angeles*, 532 Fed.Appx. 742, 742 (9th Cir. 2013)  
 15 (Plaintiff “exercised diligence in seeking amendment . . . once the County provided sufficient  
   information for him to identify [appropriate defendants].”)

17       Thus, in *Bradley*, plaintiffs dropped a California representative from their class complaint after  
 18 her allegations proved to be inaccurate. *Id.* at \*2. In her stead, plaintiffs sought to add another  
 19 California representative, but did so after the deadline to amend set by the applicable Rule 16 schedule.  
 20 *Id.* The defendants responded by accusing plaintiffs of not acting diligently; in their view, plaintiffs  
 21 knew or should have known that the first California representative was inadequate. *Id.* The court,  
 22 however, disagreed that plaintiffs had not been diligent. The court considered whether there was undue  
 23 delay given “the timing and circumstances of [plaintiff] being dropped from the case and the Court’s  
 24 first opportunity to discuss its views with the parties at the April 17, 2019 hearing, . . .” *Id.* Given that  
 25 these events were close in time to when the amendment was requested, the court easily found that  
 26 plaintiffs had been diligent. *Id.*

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1 So too here. Plaintiffs recently learned that the Court would prefer to consider certification of a  
 2 California class; and that in the event of class certification, the parties would first proceed to trial on  
 3 this limited basis. Under this approach, the Court would hold in abeyance further consideration of all  
 4 other classes proposed for certification.

5 Upon learning this, Plaintiffs moved swiftly to vet absent class members and to amend their  
 6 pleadings to include an appropriate Californian with an FHA contract. Plaintiffs also sought to work  
 7 cooperatively with Wells Fargo, so that it could obtain whatever discovery it needed on an expedited  
 8 basis.

9 Wells Fargo nevertheless faults Plaintiffs for not anticipating the Court's recent directives. The  
 10 law, however, does not demand clairvoyance; it demands diligence, and Plaintiffs acted diligently upon  
 11 learning of the Court's preference on how to manage this case. Plaintiffs are otherwise unaware of any  
 12 authority—and Wells Fargo cites none—suggesting plaintiffs seeking to certify a nationwide class must  
 13 also have representatives from all 50 states in the event that the Court directs the parties to focus their  
 14 attention on the propriety of certification for a single state.

15 In any event, it is not uncommon for courts to allow plaintiffs more time to find a suitable  
 16 representative. Thus, in *Gould v. Motel 6, Inc.*, plaintiffs were permitted to file an amended complaint  
 17 naming a new class representative more than 16 months after their initial complaint was filed, because  
 18 of their “difficulty locating additional class representatives.” 2011 WL 759472, at \*3 (C.D. Cal. Feb.  
 19 22, 2011). While Wells Fargo is correct that Plaintiffs knew of Ms. Campos “at least eight months  
 20 ago,” Opp. at 5, Dkt. 177, Plaintiffs were not aware that their breach of contract claims would not be  
 21 considered on a nationwide basis but would instead be put on hold while the Court considers  
 22 certification of California only. So informed, Plaintiffs moved quickly to vet and add Campos as a class  
 23 representative.

24 *Plascencia v. Lending 1st Mortg.*, 2012 WL 253319 (N.D. Cal. Jan. 26, 2012), cited by Wells  
 25 Fargo, is distinguishable. There, plaintiffs belatedly sought to amend class definitions to expand the  
 26 scope of the putative class lawsuit. *Id.* at \*2. Plaintiffs seek no such expansion here, inasmuch as they  
 27 were already proceeding against Wells Fargo on a nationwide basis for homeowners with FHA

1 contracts. The addition of a Californian with an FHA contract thus does not expand the scope of the  
 2 class.

3 *Plascencia* also did not allow plaintiffs to substitute a named representative who could have  
 4 been added months earlier. Plaintiffs in that case, however, provided no reason for this delay. *Id.* at \*5-  
 5 \*6. Plaintiffs here, in contrast, have adequately explained the circumstances that prompted their motion  
 6 to amend. And Plaintiffs in this case did not wait months to seek an amendment but acted within 15  
 7 days.

#### 8       **B. Wells Fargo Fails to Prove that the Timing of This Amendment Has Prejudiced It.**

9       Wells Fargo claims to be prejudiced by the fact that it has had to obtain discovery from an  
 10 additional named plaintiff on an expedited basis as discovery is closing. But at the last hearing, the  
 11 Court ordered Wells Fargo to take discovery of all absent class members. Wells Fargo thus would have  
 12 had to take discovery of Campos anyway.

13      In any event, Wells Fargo, a sophisticated corporate defendant, has had more than enough time  
 14 and ample resources to take discovery from Campos. The company completed discovery on December  
 15 10. As such, there is no basis to find that the company was prejudiced in its ability to defend itself on  
 16 class certification.<sup>1</sup>

17      Wells Fargo also claims that it was prejudiced because it could not serve written discovery on  
 18 Campos. But Wells Fargo had previously served the same discovery requests on all named  
 19 representatives, and Plaintiffs told Wells Fargo that they were willing to serve expedited responses to  
 20 those requests for Campos. On November 27, Plaintiffs provided Wells Fargo with more than 330  
 21 pages of documents. What's more, as Campos's lender, Wells Fargo presumably already had many of  
 22 these documents.

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25      <sup>1</sup> Wells Fargo could have completed discovery even earlier. Plaintiffs offered to make Campos  
 26 available for deposition in San Francisco or Los Angeles as early as Monday, November 25. Dkt. 174,  
 27 6. This offer was supported by a sworn declaration from Campos. Wells Fargo instead scheduled  
 28 Campos's deposition for two days before the due date for its opposition to Plaintiffs motion for class  
 certification.

1        Given these efforts, Wells Fargo’s speculation that Campos will not comply with discovery is  
 2 unfounded. And it bears repeating that, given the Court’s directive that Wells Fargo complete discovery  
 3 of absent class members, it is difficult to see how Wells Fargo has been prejudiced by having to take  
 4 discovery from Campos at this stage in the proceedings.

5        **C. Amendment is Appropriate Under Rule 15**

6        Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend “shall be freely given.”  
 7 “Rule 15’s policy of favoring amendments to pleadings should be applied with ‘extreme liberality.’”  
 8 *U.S. v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Courts consider five factors in determining whether a  
 9 motion for leave to amend should be granted: (1) bad faith, (2) undue delay, (3) prejudice to the  
 10 opposing party, (4) futility of amendment, and (5) whether the party previously amended a pleading. *In*  
 11 *re Western States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th Cir. 2013). Prejudice  
 12 carries the greatest weight in the analysis. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052  
 13 (9th Cir. 2003). “[U]ndue delay alone is insufficient to justify denying a motion to amend.” *Green*  
 14 *Valley Corp. v. Caldo Oil Co.*, No. 5:09-CV-04028-LHK, 2011 WL 3501712, at \*9 (N.D. Cal. Aug. 10,  
 15 2011) (quoting *Schultz v. Wal-Mart Stores, Inc.*, 68 Fed. App’x 130, 131 (9th Cir. 2003)). “The party  
 16 opposing amendment bears the burden of showing prejudice.” *DCD Programs, Ltd. v. Leighton*, 833  
 17 F.2d 183, 186–87 (9th Cir. 1987); *see also Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir.  
 18 1999) (noting courts must grant leave to amend in the absence of bad faith, undue delay, prejudice or  
 19 futility).

20        In the context of a motion for leave to amend, “‘bad faith’ means acting with intent to deceive,  
 21 harass, mislead, delay, or disrupt.” *Wizards of the Coast LLC v. Cryptozoic Entm’t LLC*, 309 F.R.D.  
 22 645, 651 (W.D. Wash. 2015). “[I]t implies the conscious doing of a wrong because of dishonest  
 23 purpose or moral obliquity . . . [I]t contemplates a state of mind affirmatively operating with furtive  
 24 design or ill will.” *Id.* (quoting *United States v. Manchester Farming P’ship*, 315 F.3d 1176, 1185 (9th  
 25 Cir. 2003)). It is much more than “bad judgment or negligence[.]” *Id.* Wells Fargo hasn’t come close to  
 26 showing that Plaintiffs acted in bad faith.

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1 Plaintiffs readily meet the applicable standard of diligence, as explained in the motion and in  
2 section II.A. above. As for prejudice, Wells Fargo has fallen far short of its burden to show that it  
3 would be prejudiced by the addition of Campos as a class representative, as explained in the motion and  
4 in section II.B. above. Finally, Plaintiffs moved at their first reasonable opportunity for leave to add  
5 Campos as a class representative, as explained in the motion and in section II.A. above. Plaintiffs didn't  
6 do so as part of their previous two amendments because the Court had not yet indicated its intentions at  
7 the time that those amended complaints were filed.

8 **III. CONCLUSION**

9 For the reasons stated, Plaintiffs respectfully request that the Court grant their motion for leave  
10 to file their proposed Third Amended Complaint.

11  
12 Dated: December 12, 2019

Respectfully submitted,

13 /s/ Michael Schrag  
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